

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KEITH DUNBAR, individually and on Behalf of)
those similarly situated,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Case No.: 5:12-cv-003305-LHK

ORDER RE: RENEWED
ADMINISTRATIVE MOTIONS TO
SEAL

On August 28, 2012, Plaintiff Keith Dunbar (“Plaintiff”) filed his Motion for Leave to File His Third Amended Class Action Complaint (“Motion for Leave to Amend”). ECF No. 205. Defendant Google, Inc. (“Google”) sought to seal portions of Plaintiff’s Motion for Leave to Amend; Proposed Third Amended Complaint (“TAC”); Google’s Opposition to the Motion for Leave to Amend; Plaintiff’s Reply; and a number of exhibits submitted by the parties in connection with their briefs addressing the Motion for Leave to Amend. *See* ECF Nos. 204, 208, 210, 213, 214. The Court granted-in-part and denied-in-part Google’s sealing requests. *See* ECF No. 227 (“First Sealing Order”). The Court denied *with* prejudice several requests to seal Google documents designated “Confidential” or “Confidential Attorneys’ Eyes Only” because Google

1 agreed that the information did not need to be sealed. *See* First Sealing Order at 4, 11. The
 2 remaining denials to seal were without prejudice. *See id.* at 12.¹

3 Presently before the Court is Google's renewed Motion to Seal: (1) portions of the Motion
 4 for Leave to Amend; (2) portions of Plaintiff's proposed TAC; (3) portions of Google's Opposition
 5 to the Motion for Leave to Amend; (4) portions of the deposition testimony of Thompson Gawley,
 6 which were attached as: (i) Exhibit A to the Declaration of Whitty Somvichian in Support of
 7 Google's Opposition, and (ii) Exhibit O to the Declaration of Sean F. Rommel in Support of the
 8 Motion for Leave to Amend; (5) portions of Plaintiff's Reply; and (6) Exhibits F and G to the
 9 Declaration of F. Jerome Tapley in Support of the Motion for Leave to Amend. ECF No. 230
 10 ("Renewed Motion to Seal"). Also before the Court is Google's Motion seeking to seal portions of
 11 the final TAC. ECF No. 234 ("Motion to Seal the TAC") (collectively, "Motions to Seal"). The
 12 Court GRANTS IN PART AND DENIES IN PART Google's Motions to Seal.

13 I. LEGAL STANDARD

14 Courts have recognized a "general right to inspect and copy public records and documents,
 15 including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 &
 16 n.7 (1978). "Unless a particular court record is one 'traditionally kept secret,' a 'strong
 17 presumption in favor of access' is the starting point. *Kamakana v. City and Cnty. of Honolulu*, 447
 18 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,
 19 1135 (9th Cir. 2003)). In order to overcome this strong presumption, a party seeking to seal a
 20 judicial record must articulate justifications for sealing that outweigh the public policies favoring
 21 disclosure. *See id.* at 1178-79. Because the public's interest in non-dispositive motions is
 22 relatively low, a party seeking to seal a document attached to a non-dispositive motion need only
 23 demonstrate "good cause." *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010)
 24 (applying "good cause" standard to all non-dispositive motions, because such motions "are often
 25

26 ¹ On page 11 of the First Sealing Order, the Court erroneously denied *without* prejudice Plaintiff's
 27 requests to seal: (1) Motion for Leave to Amend pages 4:26, 5:1-2, 5:8-10, 5:17-19, 7:14-19, 9:25,
 28 and 10:26-27, and (2) Exhibit P to the Rommel Declaration. Because Google does not wish to seal
 these Google documents that were designated "Confidential" or "Confidential Attorney's Eyes
 Only," the Court hereby denies Plaintiff's request to seal these documents with prejudice. *Id.* at 11.
 Google has not, in its Renewed Motion to Seal, requested that these excerpts be sealed.

1 unrelated, or only tangentially related, to the underlying cause of action” (citing *Kamakana*, 447
2 F.3d at 1179)).

3 Conversely, “the resolution of a dispute on the merits, whether by trial or summary
4 judgment, is at the heart of the interest in ensuring the ‘public’s understanding of the judicial
5 process and of significant public events.” *Kamakana*, 447 F.3d at 1179 (quoting *Valley*
6 *Broadcasting Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986)). Thus,
7 a party seeking to seal a judicial record attached to a dispositive motion or presented at trial must
8 articulate “compelling reasons” in favor of sealing. *See id.* at 1178. “In general, ‘compelling
9 reasons’ . . . exist when such ‘court files might have become a vehicle for improper purposes,’ such
10 as the use of records to . . . release trade secrets.” *Id.* at 1179 (citing *Nixon*, 435 U.S. at 598). The
11 Ninth Circuit has adopted the Restatement’s definition of “trade secret” for purposes of sealing,
12 holding that “[a] ‘trade secret may consist of any formula, pattern, device or compilation of
13 information which is used in one’s business, and which gives him an opportunity to obtain an
14 advantage over competitors who do not know or use it.” *In re Electronic Arts*, 298 Fed. App’x
15 568, 569-70 (9th Cir. 2008) (quoting *Restatement of Torts* § 757, cmt. b). Additionally,
16 “compelling reasons” may exist if sealing is required to prevent judicial documents from being
17 used “‘as sources of business information that might harm a litigant’s competitive standing.’” *Id.*
18 at 569 (9th Cir. 2008) (citing *Nixon*, 435 U.S. at 598).

19 Accordingly, the Court applies the “compelling reasons” standard to Google’s requests to
20 seal the TAC and the proposed TAC² because the TAC forms the “foundation” of Plaintiff’s
21 lawsuit against Google. *See In re NVIDIA Corp. Derivative Litig.*, C 06-06110 SBA, 2008 WL
22 1859067, at *3 (N.D. Cal. Apr. 23, 2008) (holding that the “compelling reasons” standard applied
23 to complaint because, “[w]hile a complaint is not, per se, the actual pleading by which a suit may
24 be disposed of, it is the root, the foundation, the basis by which a suit arises and must be disposed
25 of”). Because the other documents Google seeks to seal do not form the foundation of Plaintiff’s
26 lawsuit and are non-dispositive, the Court applies the good cause standard. *See First Sealing Order*

27
28 ² Plaintiff filed the proposed TAC with his Motion for Leave to Amend. After leave was granted,
Plaintiff filed the TAC.

at 3 (citing *Pintos*, 605 F.3d at 678 (applying “good cause” standard to all non-dispositive motions)).

II. DISCUSSION

In the Renewed Motion to Seal and Motion to Seal the TAC, Google has narrowed its sealing requests and set forth with particularity its basis for sealing portions of the TAC; Motion for Leave to Amend; Opposition; Reply; and exhibits submitted with these documents. *See* Declaration of Deepak Jindal in Support of Renewed Motion to Seal, ECF No. 231 (“Jindal Decl.”) at 9-15. The Court having reviewed Google’s Motions to Seal and the supporting declaration of Deepak Jindal rules as follows:

Document	Line/Page	Ruling
TAC and Proposed TAC (Jindal Decl., Ex. B)	Page 9, lines 5-6	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 33:5-8.
TAC and Proposed TAC (Jindal Decl., Ex. B)	Page 6, lines 14 and 18	GRANTED.
Motion for Leave to Amend (Jindal Decl., Ex. A)	Page 10, line 15-17, 22	GRANTED.
Motion for Leave to Amend (Jindal Decl., Ex. A)	Page 10, line 24-25	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 33:5-8.
Motion for Leave to Amend (Jindal Decl., Ex. A)	Page 11, lines 10-11	GRANTED.
Motion for Leave to Amend (Jindal Decl., Ex. A)	Page 17, line 11	GRANTED.
Motion for Leave to Amend (Jindal Decl., Ex. A)	Page 5, lines 15-17, 22	GRANTED.
Opposition (Jindal Decl., Ex. C)	Page 4, lines 22-23	GRANTED.
Opposition (Jindal Decl., Ex. C)	Page 5, lines 5-6, 7 ³	GRANTED.
Deposition of Thompson Gawley	Page 203, lines 5-6, 9-10, 16-17	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 191, lines 4-5, 13, 21-22	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 193, line 23	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 195, lines 10-13, 16-19, 22-	GRANTED.

³ Line 7 is not identified in the Jindal Declaration. However, this line is redacted in Google’s proposed redacted Opposition. *See* ECF No. 231-1 at 5. Moreover, the redacted information is the same type of confidential information that Google has sought to seal and that this Court finds meets the good cause standard for sealing.

	23	
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 199, lines 14-15, 17-21, 23- 25	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 200, line 8	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 200, line 8	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 31:20- 32:2.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 200, lines 19-25	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 201, lines 9, 23-25	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 202, lines 2, 4-10, 12-13, 16, 23	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 204, lines 10-11, 14-19, 24	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 205, lines 9, 14, 21, 25 ⁴	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 206, lines 1, 8-9	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 207, lines 4- 5, 12-13, 15-17, 20-22	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 208, lines 2, 11-13, 15-16	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 209, lines 15-18, 20, 24	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 210, lines 1, 6-7, 17-18, 22	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 211, lines 10-11, 22	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 212, lines 1- 2, 4, 18	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 213, lines 3, 6-7, 9-17, 19-20	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 216, lines 6- 7, 10, 13-14, 19- 20	GRANTED.
Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 221, lines 5- 7	GRANTED.
Deposition of Thompson Gawley	Page 222, lines	GRANTED.

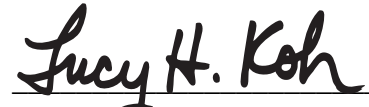
⁴ Lines 9 and 14 are not identified in the Jindal Declaration. However, these lines are redacted in Google's proposed redacted Opposition. *See* ECF No. 231-4 at 205. Moreover, the redacted information is the same type of confidential information that Google has sought to seal and that this Court finds meets the good cause standard for sealing.

1	(Jindal Decl., Ex. D)	10-11	
2	Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 223, lines 10-13	GRANTED.
3	Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 82, lines 3- 4, 17, 23-24	DENIED. While these lines are identified for sealing in the Jindal Declaration, they are not redacted in Google's publicly filed, proposed redacted Opposition. <i>See</i> ECF No. 231-4 at 82. Thus, the information has been publicly available for months.
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5			
6	Deposition of Thompson Gawley (Jindal Decl., Ex. D)	Page 83, lines 5- 14	GRANTED.
7	Reply (Jindal Decl., Ex. E)	Page 4, lines 15- 19, 21-22	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 31:20- 32:2.
8			
9	Reply (Jindal Decl., Ex. E)	Page 4, lines 4-8	GRANTED.
10	Reply (Jindal Decl., Ex. E)	Page 5, lines 1-2, 16	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 31:20- 32:2.
11	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 100, lines 6- 7, 12-14	GRANTED.
12	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 101, lines 3- 4, 7-8, 11, 14, 19	GRANTED.
13	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 103, lines 3- 4, 15, 22	GRANTED.
14	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 104, lines 1- 2, 14-15	GRANTED.
15	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 105, lines 15-17, 23	GRANTED.
16	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 106, lines 2- 3, 7-8, 12-13, 16- 17, 21	GRANTED.
17	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 176, lines 1- 3, 16-18, 22, 25	GRANTED.
18	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 177, lines 1- 5, 8, 11, 14, 19	GRANTED.
19	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 178, lines 5- 7, 9-10, 12, 15-18	GRANTED.
20	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 199, 14-15, 17-21, 23-25	GRANTED.
21	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 200, line 8	DENIED. This information has already been publicly disclosed. <i>See</i> Tr. at 31:20- 32:2.
22	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 200, lines 19-25	GRANTED.
23	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 209, lines 15-18, 20, 24	GRANTED.
24	Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 210, lines 1, 6-7, 17-18, 22	GRANTED.
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Deposition of Thompson Gawley (Jindal Decl, Ex. F)	Page 82, lines 3-4, 17, 23-24	DENIED. While these lines are identified for sealing in the Jindal Declaration, they are not redacted in Google's publicly filed, proposed redacted Opposition. <i>See</i> ECF No. 231-4 at 82. Thus, the information has been publicly available for months.
Exhibit F to the Declaration of F. Jerome Tapley	N/A (seeking to seal document in its entirety)	GRANTED.
Exhibit G to the Declaration of F. Jerome Tapley	N/A (seeking to seal document in its entirety)	GRANTED.

IT IS SO ORDERED.

Dated: August 14, 2013



LUCY H. KOH
United States District Judge